

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE SOUMEN SEN
&
THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE**

SA 119 of 2021
With
CAN 1 of 2022
Sri Nikhil Mondal
Vs.
Nemai Chandra Dey

For the Appellant : Mr. Sagnik Chatterjee

Heard on : 09.03.2022

Judgment on : 17.03.2022

Ajoy Kumar Mukherjee, J. :

1. The Defendant /Appellant Shri Nikhil Mondal being aggrieved by and dissatisfied with the judgment and decree dated September 30th 2020 passed by learned Civil Judge(Senior Division), Sixth Court, Alipore , South 24 Parganas, in Title Appeal No. 42 of 2017, has preferred this second appeal from Appellate decree. By the impugned decree the learned First Appellate Court has affirmed the judgment and decree passed by learned Civil Judge (Junior Division), 3rd Court , Alipore in Title Suit No. 03/1997.

2. Plaintiff/Respondent's case as projected in the plaint is that one Kalipada Dey, father of the plaintiff No. 2 was the thika tenant in respect of suit property and he constructed residential structure on the said property. Said Kalipada died leaving behind his wife erstwhile plaintiff No.1 and son who is plaintiff No. 2. Plaintiff No. 1 died during pendency and plaintiff No.2 became sole thika tenant in respect of the property. Initially defendant was a tenant under Kalipada Dey and after his demise defendant became tenant under plaintiff No. 1 at a monthly rent of Rs. 50/- payable according to English Calendar month. Defendant was a defaulter in making payment of rent from May, 1990. Plaintiff reasonably requires the suit property for their own use and occupation and due to paucity of accommodation, plaintiff's family members forced to sleep at the Varanda. Plaintiffs through their advocate sent a notice to quit to the defendant on 14.10.1996, but in spite of service of notice, the defendant refused to vacate the suit property. Hence the suit.

3. Defendant appeared and contested the suit by filing written statement denying all material allegations. Defendant's case is that after death of Kalipada Dey, the property was inherited by his wife and one Tarun Dey who used to issue rent receipt but thereafter Tarun Dey did not issue rent receipt. As such defendant tendered rent at the rate of Rs. 50/- per month from November, 1995 to December, 1995. The rent for the month January, 1996 was sent directly to Tarun Dey through money order, when he refused to accept such rent but the defendant deposited rent before rent control officer. Further case of the defendant is that after the death of Tarulata Mondal her

legal heirs became tenants in common and they are necessary party in this suit. Moreover plaintiff No. 1 has a house at Sajnebaria, where she has sufficient accommodation. Accordingly he has prayed for dismissal of the suit.

4. Learned Trial Court framed 8 issues in order to adjudicate dispute between the parties and after considering the evidence, both oral and documentary, as available in the record, was pleased to decree the suit. Learned Trial Court held that DW1 admitted plaintiff as landlord and the trial court while disposing the application under section 17(2) of the West Bengal premises Tenancy Act 1956 (WBPT Act) has observed that the relationship of the landlord tenant has been established from the evidence of PW1. The defendant did not challenge said finding of the court, before any higher forum. Moreover, the learned Trial Court held defendant as defaulter in payment of rent for 8 months and directed to pay Rs. 440/- as arrear rent and defendant did not challenge the said order. Defendant has filed civil deposit challans which shows that the arrear rent was not paid by the defendant on the due date i.e. 12.03.2010 but he paid it on 13.05.2010 and no application for extension of time for payment of arrear rent was filed by the defendant nor any order of extension of time was passed by the court *suomoto*. Therefore, learned trial Court held that defendant failed to comply the order passed under section 17 (2) of the said Act and as such defendant was held to be defaulter in payment of rent. Regarding reasonable requirement learned Trial Court held that notwithstanding the limited right of the plaintiff in respect of the suit property being a thika tenant, he is nevertheless entitled to be recognized in

law as owner of property having superior right in relation to the defendant and came to the conclusion that evidence of PW1 regarding reasonableness of his requirements could not be shaken inspite of lengthy cross-examination by the defendant. The defendant could neither produce any document nor brought any witness to show that the plaintiffs were having separate alternative accommodation at Sajnebari and accordingly issue regarding reasonable requirement was also disposed of by the Trial Court in favour of plaintiff. Learned trial Court also held that the notice to quit was returned with postal endorsement "not claimed" and PW1 has proved the copy of the notice to quit dated 14.10.1996 which is marked as exhibit 7 and returned envelop marked as exhibit 8 series and on perusal of notice to quit it appears that under the said notice defendant was asked to quit and vacate the suit property on the expiry of the month of November , 1996, so learned Trial Court held that one month notice to quit expiring month of tenancy was actually threat of suit, in the event defendant failed to vacate the suit property on the expiry of the notice. Accordingly the learned trial Court decreed the suit in favour of the plaintiff on the ground of default and reasonable requirement.

5. Being aggrieved and dissatisfied with the impugned judgment and decree dated 19.12.2016, defendant/tenant preferred first appeal, being Title Appeal No. 42 of 2017, which came up for hearing before the Civil Judge (Senior Division) sixth Court , Alipore. Learned First Appellate Court also observed that the finding of order No. 104 dated 23.02.2010 wherein learned Trial Court held the defendant tenant as defaulter in payment of rent was never

challenged. Moreover the defendant admitting himself as defaulter in paying rent made payment of the defaulted amount not within time i.e. on 12.03.2010, but he deposited the same on 13.05.2010 and as such learned First Appellate Court did not find any illegality or irregularity in the finding of the Trial Court that the defendant is defaulter in payment of rent and is not entitled to get protection under the law.

6. It was agitated before the learned First Appellate Court that as per Rule 1 and 2 under Order III of Code of Civil Procedure, plaint may be presented by or through power of attorney holder, but it cannot be done at the stage of evidence. Plaintiff No. 2 is not legal heir of Kalipada Dey and the power of attorney holder is not competent to depose as PW1, as he could not answer the questions put to him during cross-examination. Said power of attorney holder as PW1 could not answer the exact cause for non-appearance of the original plaintiff No. 2. The Learned Counsel for the defendant/appellant further argued before the First Appellate Court that certain facts and verification of signature, could not be made before the court as the original Plaintiff No. 2 did not appear before the court and relying upon the judgment reported in ***Janki Vashdeo Bhojwani and Ors. v. Indusind Bank Ltd. And Ors.*** reported at **AIR 2005 SC 439** and reported in ***Ram Prasad v. Hari Narain***, reported at **AIR 1998 Rajasthan 185**, Defendant /Appellant argued that power of attorney holder cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is only entitled to be cross-examined.

7. Learned First Appellate Court on perusal of the materials available in the record observed, that PW1 deposed on the strength of power of attorney and said power of attorney was marked as exhibit 1, but cause of non appearance of plaintiff No. 2 has already been assessed by the learned Court below. Learned Appellate Court held Order III Rule 1 and 2 of the Code of Civil Procedure allows power of attorney holder to present the suit on behalf of the plaintiff and also to depose in the suit. In this context learned Appellate Court made an observation that on careful perusal of the judgment of Trial Court, it does not appear in the list of issue, that any issue was forwarded regarding competency power of attorney holder to depose in the suit. Accordingly Appellate Court did not find merit of the said argument and regarding reasonable requirement he came to the conclusion that during the evidence of PW1, he produced 13 number of Ration Cards to show number of his family members. The evidence adduced during pendency of the suit is sufficient to conclude that there is reasonableness of plaintiff's requirement. Accordingly learned First Appellate Court did not find any illegality or irregularity in the judgment passed by the learned Trial Court and as such he affirmed the judgment passed by the learned Trial Court vide judgment dated 30.09.2020.

8. Being aggrieved by the aforesaid judgment and decree passed by the First Appellate Court, Defendant /Appellant has sought for admission of second appeal before us with the same question of law. Observations as regards the ground of default and reasonable requirement, made by the learned trial Court and the First Appellate Court, learned counsel for the appellants

herein has not argued much, but he argued that though the defendant was a defaulter in payment of rent but subsequently he deposited the entire arrear amount of rent. From the observation made by the courts below it is quite clear that defendant /appellant after appearance filed petition under section 17 (2) of the WBPT Act, 1956 and after evidence said petition was disposed by the court vide order No. 104 dated 23.02.2010, holding the defendant as defaulter in payment of rent for 8 months and directed to pay Rs 440/- towards arrear rent within 12.03.2010. Defendant neither complied the said order nor prayed for extension of time and he only deposited the said amount on 13.05.2010. There is nothing to show that the order No. 104 dated 23.04.2010 was challenged. Accordingly for non-compliance of the aforesaid order, it can be safely concluded on the basis of the documentary evidence, apart from oral evidence, that the plaintiff /respondent has succeeded to prove the defendant as defaulter in payment of rent.

9. Learned Counsel for the defendant/appellant strenuously argued that power of attorney holder of a party (respondent) cannot depose on behalf of principal in the absence of specific power entitling the constituted attorney to depose on his behalf and effect of probative value of deponent deposed on behalf of a party is practically nil. It is further argued that in a case of ejectment, whatever may be the ground contents of notice must be proved by the person who has sent the notice to quit. Here plaintiff No. 2 has sent the notice but he did not face dock and as such during cross-examination various questions remain unanswered by PW1 and as such it caused serious prejudice

to the Defendant /Appellant. Accordingly he laid emphasis for framing substantial issue in the second appeal as to whether the power of attorney holder of a party can depose on behalf of the principal, being the respondents in the absence of specific power entitling the constituted attorney to depose on his behalf in the suit and effect of probative value of deposing on behalf of a party.

10. From the observations made by the First Appellate Court in paragraph 18 of his Judgment, it is clear that PW1 deposed before the court on the strength of power of attorney and such power of attorney is marked as exhibit 1. From the judgment passed by the Trial Court it clearly appears that during argument before the trial Court, no issue was raised regarding competency of power of attorney holder to depose in this suit on behalf of the plaintiff/ thika tenant. Said issue has been raised for the first time before First Appellate Court and the First Appellate Court answered the said issue in favour of plaintiff. Now Order III Rule 2 of Code of Civil Procedure runs as follows:-

*“ 2...Recognized agents.—The recognized agents of parties by whom such appearances, applications and acts may be made or done are—
 (a) persons holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties;
 (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.”*

There is no express bar made in the said provisions of Code of Civil Procedure to debar the power of attorney holder to be examined as an witness on behalf of

the party to the proceedings, rather power of attorney holder is competent witness and his statement made before court cannot be ignored. From the examination-in-chief of PW1 Goutam Dey we find that he is son of plaintiff and conversant with the facts of the case and that his father who is aged about 80 years old is suffering from various old age ailments and he cannot freely move from his residence. Moreover he is short of vision and has lost clear vision due to old age and for which it is not possible for him to attend the court (paragraph 1 and 2). Defendant /Appellant has made elaborate cross-examination to the said PW1, but we do not find that any suggestion was put to the said PW1, that he has got no authority to depose on behalf of the plaintiff on the contrary when PW1 has specifically stated in cross-examination that his father will not depose as he is too old and that the age of his father is 85 years , no cross-examination was offered to the PW1 denying said fact. So, it cannot be said that the statement of such a witness shall not be read in evidence, only because PW1 had appeared by dint of power of attorney. It cannot be said that the evidence of power of attorney holder who had appeared in the capacity as holder of power of attorney, is not to be read at all.

11. In judgment reported in ***Shanti Devi Agarwal v. V.H. Lulla***, reported at **AIR 2004 MP 58**, it was held in paragraph 8:-

“8....On due consideration of rival submissions the Civil Revision No. 83/2003 deserves to be allowed. In a Gujarat High Court judgment by Hon’ble Shri S.B. Majumdar, J., (as his Lordship then was) in the matter of Parikh Amratlal Ramanlal Trustee and Administrator of Sanskrit Pathshala Institution v. Rami Mafatlal Girdharilal, AIR 1983 NOC 108 (Gujarat) it was held:

“Whether the general power of attorney holder of party can be a competent witness on behalf of a party before a judicial Tribunal or authority has to be answered in the light of

section 118 of the Evidence Act and for answering that question the provisions of Order 3 Rule 1 and 2(a) of the Civil Procedure Code are beside the point and can afford no guidance whatsoever. Giving deposition on oath as a power of attorney holder of a party is not a part of pleadings. It is a part of the procedure for proving a case by examining a competent witness. Who can be a competent witness is indicated by the Evidence Act alone as per section 118. The power of attorney holder of a party, only on the ground that he holds the power of attorney, cannot be said to be in the category of persons who are incapable of being witnesses as provided by section 118 of the Evidence Act. Whether such a power of attorney holder has personal knowledge about the matters in controversy may be a question which can be thrashed out by cross-examining him and if it is found that the power of attorney holder has no personal knowledge about the facts and controversy, the evidentiary value of his deposition may be whittled down, but that has nothing to do with the competence of such a power of attorney holder to depose before a Court or a judicial Tribunal as a competent witness.”

The Court relied on a judgment of the Madras High Court reported in AIR 1966 Madras page 14. Thus, as per the judgment a general power of attorney holder of a party was not barred by Order 3 Rule 2 (a) of the Code 1908, to give evidence on behalf of that party. Similarly in a judgment of this Court in the matter of Shiv Narayan Soni v. Smt. Parwati Bai Meshram, 1997 (1) Vidhi Bhasvar 280, Hon’ble Shri D.M. Dharmadhikari, J. (as his Lordship then was) has held that in a case for eviction under section 23(a) of the Act, the landlady herself was not required to prove bona fide need and this could be deposed by her holder of power of attorney.”

12. In the context we may also profitably refer paragraph 13 of another single bench judgment of Rajasthan High Court, reported in ***Kailashi Devi v. Matadeen Agrawal & Ors.***, reported at **AIR 2001 Raj 306**, which runs as follows:-

“13....In view of the above said discussions it is settled law that power attorney is a competent witness and is entitled to appear as such. His statements in the court cannot be ignored or it cannot be said that the statement of such a witness shall not be read in evidence only because of the reason that he had appeared as power of attorney and in case the parties to suit i.e. plaintiff or defendant do not choose to appear as a witness in witness box it cannot be said that the evidence of the power of attorney who had appeared in the capacity as holder of power of attorney is not to be read at

all. His evidence is to be evaluated as per his deposition before the court and in case the court finds that witness/evidence of such power of attorney does not repose a confidence, the court is at liberty to evaluate the same. There is no jurisdiction with the court to say that the evidence of such person shall not be read at all and that the plaintiff must appear in the case in her support. The order of the trial court is liable to be set aside.”

13. A Single Bench of this court in ***Banka Behari Dutt v. Gour Mohan Dutta***, reported at **AIR 1981 Cal 185**, while dealing with the similar question in an eviction suit on the ground of reasonable requirements did not accept Appellants contention that non-examination of the landlord in the case could be fatal. Defendant /appellant in this case refused to receive the notice and as such it returned with the postal endorsement “not claimed”. Defendant/Appellant has also not contended that the contents of the notice are defective. Moreover plaintiff himself has signed the plaint and filed it before the court, wherein he has clearly mentioned about sending notice to quit by him upon the defendant. Before the trial Court defendant nowhere denied or disputed plaintiff’s signature either in the plaint or in the notice and as such Defendant /Appellant has hardly any scope to argue, that the evidence of PW1 on the strength of power of attorney as regards notice point or on the point of reasonable requirement or default, cannot be read at all, only because PW1 had appeared by dint of power of attorney. Moreover there is no compulsion under the law that landlord must specify the grounds of eviction in the notice to quit or that he is bound to prove personally the contents of notice, where the signature of landlord in notice and statement regarding sending of eviction notice by Landlord in plaint signed by him has been clearly

manifested. Accordingly we do not find any substance to the aforesaid argument made by the Defendant /Appellant and we also do not find that any substantial question of law involved in the present case.

14. The Judgment referred by defendant/appellant reported in ***Man Kaur (Dead) By LRS. v. Hartar Singh Sangha***, reported at **2010 (10) SCC 512** is not factually applicable in the present context because it was a case where agreement for sale entered between parties through power of attorney holder and earlier power of attorney holder who executed the agreement on behalf of the producer was not examined and he stated about his un awareness of transaction before issuing the said notice. But the principle laid down in said judgment is very much applicable in the present context also. Paragraph 18 of said judgment may be reproduced below:-

“18...We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

- (a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.*
- (b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.*
- (c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.*
- (d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in*

case of principals carrying on business through authorized managers /attorney-holders or persons residing abroad managing their affairs through their attorney –holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holder had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his “state of mind” or “conduct”, normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “bonafide” need and a purchaser seeking specific performance who has to show his “readiness and willingness” fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed , transacted and looked after by an attorney (who may happen to be a closes family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”. Examples of such attorney-holders are a husband /wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father /mother exclusively managing the affairs of a son/daughter living abroad.”(emphasis added).

15. In view of above and that no substantial question of law involved in the present context , we are not inclined to admit the second appeal and as such it is liable to be dismissed

16. SA 119/2021 along with CAN 1/2022 stands dismissed.

There will be no order as to costs .

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities

I agree

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)